Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1323

WILLIAM ANTONIO QUINONES a/k/a CHENGO
a/k/a WILLIE and CANDIDA FIGUEROA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, William Antonio Quinones and Candida Figueroa, pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgment of that court in affirming the Order of the United States District Court for the Eastern District of Pennsylvania.

OPINION BELOW.

The Order of the United States District Court for the Eastern District of Pennsylvania, entered September 6, 1979 (App. A23) is not officially reported. The per curiam

Opinion of the United States Court of Appeals for the Third Circuit, filed January 17, 1980 (App. A25) is not yet officially reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered January 17, 1980 (App. A31). A timely petition for rehearing was denied on February 11, 1980 (App. A33). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Whether, by disregarding Petitioners' on-the-record waiver of conflict-free representation, and in the absence of an actual conflict of interest, the United States Court of Appeals erroneously affirmed the trial court's disqualification of counsel and thereby deprived Petitioners, without due process of law, of their paramount, continuing, and inviolable Sixth Amendment right to retain counsel of their choice.

CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent portion of the Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT.

Petitioners were indicted, along with ten other defendants, on May 31, 1979 in a twelve count indictment charging a conspiracy to engage in the unlawful traffic of heroin in violation of 21 U. S. C. 841(a)(1), 843(b), and 952(a), and related substantive offenses.

Both Petitioners are named in Count One, the conspiracy count of the indictment. Overt Act No. 15 states that from December 1976 to February 1977, Petitioners traveled to Philadelphia, Pennsylvania from Chicago, Illinois. Paragraph 4(h) of the indictment alleges, in part, that in order to further the objects of the conspiracy, Quinones directed and supervised Figueroa in the acceptance of requests for purchases of heroin, the arrangement of deliveries of heroin, the acceptance of payment for delivery of heroin, and the delivery of heroin.

On August 27, 1979, upon learning that Petitioners intended to be jointly represented, the government filed a motion for a pretrial hearing to determine if Petitioners would be denied their Sixth Amendment right to effective assistance of counsel if they continued with joint representation, and if so, to determine if a knowing and intelligent waiver of that right could be elicited.

For approximately two hours on September 4 and 5, 1979, the trial court conducted a hearing (which generated 73 pages of testimony) pursuant to the Third Circuit decisions in *United States v. Dolan*, 570 F. 2d 1177 (3rd Cir. 1978) and *United States ex rel. Hart v. Davenport*, 478 F. 2d 203 (3rd Cir. 1973).

Petitioners argued at the hearing that they have a constitutional right to be represented jointly by retained counsel of their choice and to waive certain Sixth Amendment guarantees which might otherwise protect them. The government argued that if it acquiesced in allowing Petitioners

to proceed with joint representation it would be fostering clearly reversible error, however remote, which might result in needless and protracted litigation.

The trial court ruled that a *potential* conflict of interest existed. Despite the expressed preference of Petitioners to retain counsel of their choice and their expressed willingness to relinquish their right to conflict-free representation, the trial court, without specific findings and without articulated substantial reasons to justify disqualification of counsel, nevertheless, was not satisfied that Petitioners made a knowing and intelligent waiver of their constitutional right to effective assistance of counsel (App. A16-A21).

Without oral argument, and in a per curiam opinion, the Court of Appeals for the Third Circuit affirmed the District Court on January 17, 1980 (App. A25).

Defendants, William Antonio Quinones and Candida Figueroa, now petition this Court for a writ of certiorari to review the judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals in this case, if allowed to stand, implicitly establishes a *per se* rule which, despite defendants' expressed preference to retain counsel of their choice and an expressed willingness to relinquish their right to conflict-free representation, disqualifies counsel under all circumstances from representing more than one defendant in a criminal case.

The rule thus established is contrary to the United States Constitution, numerous precedents in this Court, and conflicts with Third Circuit decisions as well as decisions in other circuits. For the orderly administration of criminal justice it is imperative that this Court establish a uniform rule that the expressed preference of more than one defendant for joint representation by retained counsel must remain paramount until (1) an actual conflict of interest manifests itself on the record and (2) the trial court makes findings and articulates substantial reasons to justify disqualification of counsel.

I. By Failing to Distinguish the Facts and Circumstances of the Instant Case From the Post Trial Conflict Cases and the Actual Conflict Cases, and by Disregarding the Petitioners' Waiver of Conflict-Free Representation, the Court of Appeals Has Denied Petitioners Their Paramount, Continuing and Inviolable Right to Representation by Counsel of Their Choice.

Petitioners assert that their right to representation by counsel of their own choice has been violated by the trial court's order, affirmed by the Court of Appeals preventing their selected attorney from representing them. They further assert that assuming *arguendo* that counsel is burdened with conflicts of interest, their right to representation by counsel of their individual choice is a paramount, continuing and inviolable right which may not be abrogated by the judgment of either the trial court or the Court of Ap-

peals. It is clear that Petitioners do not seek to waive their right to counsel; rather, they assert their Sixth Amendment right to be represented by counsel of their own choice. *Kaplan v. Bombard,* 573 F. 2d 708, 714 (2nd Cir. 1978); *United States v. Villarreal,* 554 F. 2d 235, 236 (5th Cir.), *cert. denied,* 434 U. S. 802 (1977); *Abraham v. United States,* 549 F. 2d 236, 239 (2nd Cir. 1977).

In the instant case the trial judge, not satisfied by counsel's assurances alone, conducted in accordance with the teachings of *United States v. Garcia,* 517 F. 2d 272 (5th Cir. 1975), cited with approval in *United States v. Dolan,* 570 F. 2d 1177 (3rd Cir. 1978), a thorough examination of each Petitioner on the record in which he explained, inter alia, the seriousness of the charges, the possibility at trial that the best protection of the interest of one defendant may be different from the protection of the interests of the other defendant who is represented by the same counsel, and the right of each defendant to separate counsel. Both defendants were required to address the court personally, assured the trial court that they understood what was being said, and unequivocally reaffirmed their desire to remain with present counsel (App. A3-A10; A12-A15). In addition, both Petitioners signed, with the advice and in the presence of Puerto Rican counsel, a letter acknowledging the possibility of a conflict of interest but nevertheless requesting representation by the same counsel (App. A10-A12; A22). Indeed, based on this record and colloquy, it appears self evident that Petitioners waived their Sixth Amendment rights by "clear, unequivocal and unambiguous language". *United States v. Garcia, supra,* 517 F. 2d at 278.

It is well-established that a defendant may waive his right to assistance of counsel who is free from any conflict of interest. *Glasser v. United States,* 315 U. S. 60, 70 (1942); *Holloway v. Arkansas,* 435 U. S. 475, 483, n. 5 (1978). The Court in *Holloway* noted that the inquiry

in *Glasser* into whether there had been a waiver confirmed that a defendant may waive this right. *Ibid.* Specifically, this Court stated that:

> "One principle applicable here emerges from *Glasser* without ambiguity. Requiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation" 435 U. S. at 482.

Unquestionably, the Third Circuit has recognized this principle in *United States ex rel. Hart v. Davenport,* 478 F. 2d 203 (3rd Cir. 1973) wherein Judge Gibbons, in dicta, stated that the right to effective assistance of counsel may be waived as long as the dangers of joint representation are explained to the defendant at the earliest possible time in the proceedings. *Id.* at 210-211.

Admittedly, the waiver of effective assistance of counsel is subject to the rules governing waiver of constitutional rights. *Johnson v. Zerbst,* 304 U. S. 458 (1938), which delineates the standard measuring an effective waiver of a constitutional right, requires that a waiver must be an "intentional relinquishment or abandonment of a known right" which is made with an awareness of the likely consequences of the waiver. For a trial judge to find that a waiver is knowing and intelligent, he must be satisfied that the defendant is aware of the foreseeable prejudices his attorney's continued representation could entail for his trial, and possible detrimental consequences of those prejudices. *United States v. Garcia,* 517 F. 2d 272, 278 (5th Cir. 1975). Thus, the Third Circuit has held:

> ". . . when a trial court finds an *actual* conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant." *United States v. Dolan*, 570 F. 2d 1177, 1184 (1978) (emphasis added) *Accord: United States ex rel Hart v. Davenport, supra.*

Conversely, the Third Circuit has held, in the absence of an actual conflict, criminal defendants are allowed their choice of counsel. *Matter of Grand Jury Empaneled January 21, 1975*, 536 F. 2d 1009 (3rd Cir. 1976).

Clearly, the instant case is distinguishable from *Davenport, supra,* which concerned an appeal from a denial of a petition for habeas corpus challenging a state court conviction principally on the ground that defendant was deprived of effective assistance of counsel *in his trial* because his attorney represented his codefendant. Of course, the instant case is still in the *pretrial* stage and, therefore, the concerns of the courts expressed in *post trial* appeals have no applicability. *United States ex rel. Hart v. Davenport*, 478 F. 2d 203, 209-210 (3rd Cir. 1973) (and cases cited therein).

Moreover, the instant case is distinguishable from *Dolan, supra,* wherein the Third Circuit affirmed the lower court's disqualification order, on the ground, inter alia, that an actual conflict became manifest after one jointly represented defendant (Garafola), entered a plea of guilty and subsequently became an important prosecution witness which, at the trial of the remaining defendant (Dolan), prevented counsel from effectively cross-examining his former client without intruding into matters protected by the attorney-client privilege.

Unless this Court, therefore, adopts a *per se* rule which automatically disqualifies counsel from representing

more than one defendant, the expressed preference of an accused for joint representation by particular counsel must remain paramount until an actual conflict of interest manifests itself on the record. See, *e.g., Matter of Grand Jury Empaneled January 25, 1975, supra.* In short, the clash of constitutional considerations between a criminal defendant's right to retain counsel of his own choice and the right to have the effective assistance of counsel must be resolved, in light of the record in this case, in favor of the former and not the latter. To suggest, as the Government does, that it is impossible as a matter of law to waive the Sixth Amendment right to effective assistance of counsel even in circumstances involving serious conflicts of interest is both novel and unfounded.

II. The Court of Appeals Has Erroneously Extended the Holding of *Holloway v. Arkansas* and Its Opinion Conflicts With Decisions in Other Circuits.

In *Holloway v. Arkansas*, 435 U. S. 475 (1978) a public defender was appointed to represent three men charged with rape and robbery. Although defense counsel stated that there was a possibility of a conflict of interest among the defendants, the court denied the attorney's motions for separate counsel. Against counsel's recommendations, all three men testified. Because of the possibility of incriminating one or all of the accused, the attorney was effectively precluded from directly examining the three and could not cross-examine them. The jury returned guilty verdicts for all three on all counts. This Court reversed and held that if defense counsel states that a grave risk of conflict of interest exists, the failure of the trial court to examine the claim carefully is a violation of the Sixth Amendment.

The Third Circuit has erroneously extended the *Holloway* holding by adopting implicitly a *per se* disqualification

of counsel rule which has the deceptive lure of simplicity but which offends Constitutional principles. The extent of this Constitutional intrusion is reflected in the disagreement among the circuits regarding the scope and nature of the trial judge's duty to inquire whether a conflict exists.

The First, Eighth, and District of Columbia Circuits impose an affirmative duty on the court in cases of joint representation to warn defendants of the possible dangers posed and to advise them of their right to separate counsel.[1] Other circuits have less rigorous requirements. The Second Circuit has held that during the trial court's inquiry there is no need to question the defendant personally regarding waiver.[2] The Seventh Circuit requires even less: although the trial court did not conduct an inquiry, it was reasonable to assume from facts in the record that the defendant's attorney had informed him of the dangers of joint representation.[3]

1. *See United States v. Lawriw*, 568 F. 2d 98, 195 (8th Cir. 1977) (trial court properly held inquiry to inform defendant of danger of joint representation and to determine if he wanted to waive right to separate representation; without inquiry, difficult to determine if defendant's waiver knowing and intelligent), *cert. denied*, 435 U. S. 969 (1978); *United States v. Donahue*, 560 F. 2d 1039, 1042 (1st Cir. 1977) (representation by different partners in same firm equivalent to joint representation; failure to warn defendants of dangers of joint representation shifts burden to Government to prove no prejudice resulted); *Campbell v. United States*, 352 F. 2d 359, 360 (D. C. Cir. 1965) (in cases of joint representation trial court has duty to ascertain whether each defendant is aware of potential risks and has knowingly chosen joint representation).

2. *Kaplan v. Bombard*, 573 F. 2d 708, 714 (2d Cir. 1978) (defendant waived right to separate counsel, even though at pretrial inquiry judge questioned attorney and defendants collectively, but not individually; defendant remained quiet throughout).

3. *United States v. Kidding*, 560 F. 2d 1303, 1310 (7th Cir. 1977) (defense counsel told court that based on conversations with defendants, he did not think there would be conflicting defenses and if there were, he would advise one to get another attorney).

Similarly, the Fourth Circuit does not require a hearing, although it has indicated that a trial judge should inquire into the possibility of conflicting interests whenever multiple defendants are represented by the same attorney.[4] No hearing to advise an accused of his right to separate representation is required in the Fifth Circuit unless there is a claim that a conflict of interest exists, an objection to joint representation is expressed, or notice is given to the trial court of a possible conflict.[5] Moreover, a defendant may choose to be represented by a given attorney even though possible or actual conflicts exist; such an election waives the right to conflict-free representation if it is knowing and intelligent.[6] In contrast, the Ninth Circuit has held that when the trial court perceives an actual conflict of interest, it may disregard the defendant's waiver of his right to separate counsel and order substitution of counsel to ensure effective representation.[7]

4. *See United States v. Atkinson*, 565 F. 2d 1283, 1284-85 (4th Cir. 1977) (although court should conduct inquiry into possible conflict of interest in joint representation, failure to do so does not per se violate sixth amendment), *cert. denied*, 436 U. S. 944 (1978).

5. *See United States v. Johnson*, 569 F. 2d 269, 272 (5th Cir.) (attorney appointed to represent defendant's husband-codefendant later retained by defendant; no claim raised, record showed no conflict of interest, and prejudice not proved by defendant), *cert. denied*, 437 U. S. 906 (1978).

6. *See United States v. Villarreal*, 554 F. 2d 235, 236 (5th Cir.) (defendant and key witness for Government represented by partners of same law firm; during trial, judge notified parties of potentially conflicting interests between defendant and witness and advised against representation by partners of same law firm; defendant knowingly and intelligently waived conflict-free representation), *cert. denied*, 434 U. S. 802 (1977).

7. *United States v. Vargas-Martinez*, 569 F. 2d 1102, 1104 (9th Cir. 1978) (court properly denied request for joint representation after one defendant agreed to become Government witness; conflict of interest inescapable).

Thus, the implications of the Third Circuit's holding that in the absence of an actual conflict of interest defendants are precluded from retaining counsel of their choice and waiving their right to conflict-free representation have far-reaching and serious consequences. If freedom of choice of counsel which is essential to a functioning democracy is to be eliminated, either directly or by erosion, and through judicial rather than legislative power, this Court should accept the responsibility.

III. Arbitrary Dismissal by the Trial Court of Petitioners' Attorney Without Express Findings and Substantial Reasons to Justify That Dismissal Is Clearly Erroneous and Violates Petitioners' Due Process Right to Choice of Counsel.

Despite the trial court's sensitivity to the theoretical possibility of a conflict of interest, despite the trial court's searching inquiry by careful and explicit questioning, and despite the unconditional nature of Petitioners' choice to be represented jointly, the trial court concluded, without articulating reasons or making adequate findings, that Petitioners could not make a knowing and intelligent waiver of their Sixth Amendment right to effective assistance of counsel. This conclusion is self serving, arbitrary, not supported in the record, and contrary to the law in the Third Circuit.

United States v. Laura, 607 F. 2d 52 (3rd Cir. 1979) held that it was clearly erroneous for the trial court to dismiss defendant's local counsel on the basis of a potential conflict between local counsel and the judge. Moreover, the Third Circuit held that defendant need not show that dismissal of local counsel was prejudicial in order to obtain remand for further proceedings to determine the propriety of the lower court's action. *Id.* at 58.

In speaking for the court, Judge Higginbotham's views are singularly relevant here in support of Petitioners' position:

> "The right of the assistance of counsel is a critical element of our American system of jurisprudence. A defendant's decision to exercise that right and to place his liberty and possibly his life in the hands of an attorney of his choice may not be lightly tampered with. In this case, the district judge dismissed one of the defendant's attorneys without making any findings to justify that dismissal.
>
> * * *
>
> We also note that the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured.
>
> Thus, if a defendant chooses a particular counsel, the sixth amendment prevents a court from taking any 'arbitrary action prohibiting the effective use of [a particular] counsel.' *United States ex rel. Carey v. Rundle*, 409 F. 2d 1210, 1215 (3d Cir. 1969), *cert. denied*, 397 U. S. 946, 90 S. Ct. 964, 25 L. Ed. 2d 127 (1970).
>
> * * *
>
> ". . . the learned trial judge was appropriately concerned about a reasonably prompt disposition of his substantial caseload. He desired to move this case with reasonable dispatch. But such dispatch, *without adequate findings*, cannot justify the ruling below." 607 F. 2d at 53, 57, 58 (emphasis added)

Moreover, in Judge Adams' concurring opinion, in which Judge Rosenn joined, he noted:

> "As Judge Higginbotham points out, the right of a criminal defendant to be represented by counsel of her choice is an important right-one that may not lightly be frustrated. But this right is not absolute, and a court may, *for substantial reasons,* refuse to permit the defendant's choice of counsel to participate in a case.
>
> Thus, the district court's decision to dismiss [local counsel] may be justifiable; but, like the majority, I am unable to address that issue in a thoughtful manner because *the district judge did not set forth the reasons for his ruling.* A hearing on this issue followed by a written explanation not only would facilitate review by the Court, but also would help to ensure that Mrs. Laura's sixth amendment rights are not impaired without adequate justification."
>
> * * *
>
> "The right to select counsel of one's choice is a critical constitutional right that may be abridged only for substantial reasons. Neither this Court nor a district court can evaluate, under the facts of a particular case, whether the right has been unduly fettered unless the issue has been briefed and argued, and the trial judge sets forth findings to justify his decision. Accordingly, I agree that the matter should be remanded for a further hearing and for findings." 607 F. 2d at 60-61. (Emphasis added)

At the very least, therefore, the judgment should be reversed, the government's motion for summary affirmance should be denied, and the case remanded for findings consistent with the law of *Laura, supra.*

CONCLUSION.

The questions presented by this proceeding are of such a nature that they can be resolved only by this Court. Otherwise, as stated in an analogous context in *Adams v. United States ex rel. McCann,* 317 U. S. 269 (1942):

> "What were contrived as protections for the accused should not be turned into fetters . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.
>
> ". . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution." 317 U. S. at 279-280, cited with approval in *Faretta v. California,* 422 U. S. 806, 815 (1975).

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that on the 26 day of February, 1980 three (3) copies of the within Petition for Writ of Certiorari were deposited in a United States mail box with first class postage prepaid addressed to the only party herein to be served: Solicitor General, Department of Justice, Washington, D. C. 20530.

CHARLES B. BURR, II,
Attorney for Petitioners,
William Antonio Quinones and
Candida Figueroa.

APPENDIX.

EXCERPTS FROM TRANSCRIPT OF HEARING, SEPTEMBER 5, 1979, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

[3]

Mr. Wehner: Your Honor, if I may, this is Mr. Febles from Pretrial Services who we have asked to attend a hearing today for the purposes of interpreting.

Mr. Febles: My name is Roberto Febles, your Honor.

The Court: Very nice to have you here, Mr. Febles.

We are here to resume the hearing commenced yesterday. What we are trying to determine is whether it is appropriate for Mr. Burr to continue to represent both Candida Figueroa and William Quinones, in view of the fact that they are co-defendants in this criminal case, 79-139, together with numerous other defendants. We paused yesterday because Mr. Dennis suggested, very properly I think, that the inquiry was one which was particularly difficult without having the assistance of an interpreter who could really assure that my questions and questions put by counsel, whether Mr. Burr or Mr. Dennis or Mr. Wehner, would be completely understood by Mr. Quinones and Miss Figueroa and, conversely, could assure that their responses would be fully understood by those of us not fluent in Spanish and that the record made would be one that would be

[4]

adequate for decision here and review, if review is required at some later stage of the case. For that reason, Mr. Febles, we are very gratified to have you here.

I will undertake to ask a few questions of each of the defendants to see if I can satisfy myself that these defendants do understand the possibilities of conflicting professional obligation that Mr. Burr might be thrust in if he is to represent both of them and in order to determine whether, notwithstanding such awareness, these defendants, as Mr. Burr has represented to us yesterday, are desirous of and capable of making a knowing and intelligent waiver of the hazards of what otherwise would appear to be a form of representation which, with all the best will in the world, wouldn't afford the defendants their full constitutional measure of entitled legal defense.

Now I will put certain questions but, of course, with the understanding that these can be supplemented by counsel, by Mr. Burr and by Mr. Dennis and Mr. Wehner. I cannot recall whether yesterday we placed Miss Figueroa and Mr. Quinones under oath. I hope we did.

Mr. Wehner: We didn't, your Honor.

[5]

I'd request that we do so today.

The Court: We did not?

Mr. Wehner: No, your Honor, we did not.

The Court: I think we should do that now. I am going to ask each of you, Miss Figueroa and Mr. Quinones, to take an oath which Miss Fears will administer to tell the truth in this hearing today.

The Clerk: Has the interpreter been sworn, sir?

The Court: Miss Fears has made the point that we should begin by swearing Mr. Febles, which I think is quite proper. If you would, Miss Fears.

(The interpreter is sworn.)

The Court: Mr. Febles, would you tell Miss Figueroa and Mr. Quinones that we are now about to swear them? I think they may have thought they were being sworn with you.

(The defendants are sworn.)

(The following testimony is taken with the aid of the interpreter.)

The Court: Mr. Quinones, have you had a chance to read this indictment?

[6]

Mr. Quinones: Yes.

The Court: Can you tell me in your own words what charges there are in this indictment against you?

Mr. Quinones: Aiding and abetting, conspiracy, two counts in total, three counts. Also distribution of heroin.

The Court: And what do you understand, Mr. Quinones, was the purpose of the conspiracy that was charged against you?

The Interpreter: He doesn't know how to answer that particular question. He would like for you to repeat it, your Honor, if possible.

The Court: You know that you are charged with conspiracy. A conspiracy to do what?

Mr. Quinones: Conspiracy to sell and distribute heroin.

The Court: Do you know what this conspiracy charges? I'm sorry. I beg your pardon. Do you know what this indictment charges against Miss Figueroa? Do you know, Mr. Quinones, what this indictment charges?

Mr. Quinones: No, he doesn't. That's why I don't feel that it is a conflict of interest.

[7]

The Court: You say you don't know what it charges against Miss Figueroa?

Mr. Quinones: I know what the charges are but I don't feel that it is a conflict of interest.

The Court: Could you tell me what you think the charges are against Miss Figueroa?

Mr. Quinones: She is accused of conspiracy to distribute and to supervise and arrange deliveries of heroin.

The Court: Mr. Febles, would you read to Mr. Quinones paragraph 4H of the indictment which begins at the bottom of Page 4 and goes to the top of Page 5? Would you read that to him in Spanish?

(Pause.)

The Court: I beg your pardon, Mr. Febles. I wonder if you are going further than——

The Interpreter: I beg your pardon. I was going down into the fifth paragraph.

The Court: I just wondered if you would explain to Mr. Quinones that I am just concerned for the moment with paragraph 4H down to just where it says number five.

Now, Mr. Quinones, when this case comes to trial it may be that the Government through Mr. Dennis

[8]

and Mr. Wehner would put witnesses on the witness stand who would testify that the people listed at the beginning of that paragraph, Miriam Rios, Jesse Montero, Candida Figueroa and John Doe, also known as Moses, did the

things that are mentioned there, accepting requests for heroin, arranging delivery of heroin, accepting payment, etcetera. Do you understand that witnesses for the Government might say those things?

Mr. Quinones: Yes.

The Court: That is, that might be a way in which the Government would prove part of its case.

Mr. Quinones: Yes.

The Court: Now, those witnesses might also say that these people whom I have listed were acting under the direction of yourself and your brother, Ishmael Quinones. You understand that possibility, do you not?

Mr. Quinones: Yes.

The Court: Now, it might well be, Mr. Quinones, that you would feel that whatever those four people did, and again I'm talking about Rios, Montero, Figueroa and John Doe, was not something done

[9]

at your direction. For example, you might feel maybe they were working for your brother but not for you. You understand that might be a line of defense that you would want to make against these charges and it might, for example, be that you would want to be a witness for yourself and to say exactly that and to explain to the jury that you had no idea what those four people were doing.

Now, at the same time, Candida Figueroa might feel that she would wish to defend against these charges by saying, "I was working in an office somewhere answering the phone and sorting mail but I was just taking messages and typing and sealing letters and I had no idea what was being shipped or what payments were being made for,"

and she also might say, "Whatever I was doing, which was just clerical work, I was simply following out the directions of the two people who I was working for, who were the Quinones brothers."

Now, Miss Figueroa might wish to take the witness stand to say that to the jury. Now, Mr. Quinones, I hope you understand that I am just describing a possible situation to you because I know nothing more about this case than what is written down

[10]

here in this indictment and I am just trying to speculate about possible lines of defense. Of course, here we are just talking about one small portion of a very large case but it happens to be a portion that relates to you, Mr. Quinones, and to Miss Figueroa.

I should say, Miss Figueroa, that I am saying all this to Mr. Quinones but I hope you are listening too because in a moment I will ask Mr. Quinones a question but I will also ask you a question in a moment or two.

Now, I wonder if you see, Mr. Quinones, that I have suggested a situation in which Miss Figueroa would be wishing to get on the witness stand and give testimony which would be inconsistent with the testimony which you would wish to give because she would be testifying about how she took orders from you as well as your brother, while you would wish to give testimony asserting that you had no idea what those four people, including Miss Figueroa, were doing.

Now, in that situation, Mr. Quinones, what I want you to think about and what I want Miss Figueroa to think about is what Mr. Burr should do if he is representing both of you. Would you think he should put you on the witness stand to give your testimony,

[11]

to ask you the questions under which you would say, "No, I had no idea what Miss Figueroa was doing," and then put Miss Figueroa on the witness stand to say, "Everything I did I was doing at the direction of Mr. William Quinones and his brother."

Do you see there that Mr. Burr would have a conflict of interest?

Mr. Quinones: Yes, I see in that situation the possibility of a conflict of interest. What I could do in that kind of a situation is to leave that in the hands of the attorney for him to decide. But I agree that in a situation such as that there could be a conflict of interest. But we are in agreement, both of us, that even in a situation such as that, that he still be the counsel for both of us.

The Court: I see. Miss Figueroa, have you been listening with care to the long speech I made to Mr. Quinones?

Miss Figueroa: Yes, I have.

The Court: And do you understand that I have described a situation in which you might wish to give testimony going in one direction and Mr. Quinones might wish to give testimony going in a very different direction?

[12]

Miss Figueroa: Yes, I understood.

The Court: Let me ask you, if I may, if you could tell me in your own words what the possible conflict is that is involved in the situation that I was asking about.

Miss Figueroa: I see there might be a conflict of interest in the question concerning his job or his work and his work consisted of giving her instructions, but I prac-

tically do not agree with the possibility of a conflict of interest being present even in that situation because I was in Puerto Rico and I didn't have anything to do with his job because he used to work or he worked in Chicago.

The Court: I see. Mr. Quinones, suppose that Mr. Burr in preparing this case for trial came to the conclusion that Miss Figueroa had some knowledge and some participation in relation to this conspiracy which has been charged against you and her and others but that Miss Figueroa really had a very minor role as compared with you. Do you understand I am not saying that Mr. Burr would decide, well, Mr. Quinones, you are guilty but he might decide, well, the Government has a strong case against you and a very weak case against Miss Figueroa, but some case.

[13]

Do you understand?

Mr. Quinones: Yes.

The Court: Now, a lawyer who was representing Miss Figueroa but was not representing you might feel under those circumstances that he ought before the trial to go to Mr. Dennis and Mr. Wehner and say, "Although I think you have a weak case against my client, Miss Figueroa, I realize there is some evidence and you might be able to get a conviction if she goes to trial, but I would be willing to recommend to my client, Miss Figueroa, that she plead guilty, provided that you, the Government attorneys, will agree only to recommend probation and not a prison sentence."

Can you imagine that there might be such a situation?

Mr. Quinones: Yes, I do.

The Court: And can you also imagine that under those circumstances Mr. Dennis and Mr. Wehner would respond

saying, "We will certainly consider that but on the understanding that Miss Figueroa would be a witness if we called her, testifying against the other defendants whose activities she knew about."

[14]

Do you see that under those circumstances that would mean that a lawyer might be telling Miss Figueroa, "I think it would be in your interest to plead guilty but you will have to testify against William Quinones and others."

Now, can you also see that it would be very hard for Mr. Burr or any other lawyer who represents both you and Miss Figueroa to make that kind of arrangement against—for Miss Figueroa but that would be damaging to your interests? Do you see that problem that I am suggesting?

Mr. Quinones: Yes.

The Court: Can you tell me, Mr. Quinones, what you think you would want Mr. Burr to do if that situation presented itself and he were representing both you and Miss Figueroa?

Mr. Quinones: I think that situation would never occur, but if it does I would leave it in the hands of the attorney for him to decide.

The Court: Miss Figueroa, have you listened also to this question that I have just put to Mr. Quinones?

Miss Figueroa: Yes.

The Court: You see the possibility

[15]

there that Mr. Burr might be torn between his obligation to make the best arrangement possible for you and his obligation also to protect Mr. Quinones?

Miss Figueroa: Yes.

The Court: What would you think Mr. Burr should do in a situation like that?

Miss Figueroa: I think—I'm not sure—that Mr. Burr has the skills and the honesty and he would be willing to provide the same type of defense for both of us.

The Court: Well, I have tried to explore certain possible situations, two possible situations, and I don't find myself satisfied that these defendants can be said to be in a position to make the kind of knowing and intelligent waiver that I think our Court of Appeals very properly requires in a situation of potential conflict. I announce this sort of tentatively as my immediate feeling but I want to give you, Mr. Burr, an opportunity to perhaps ask such supplementary questions or make any such comment to me as you think would help educate me better.

Mr. Burr: May I have this document marked D-1, your Honor?

The Court: Yes, indeed.

[16]

(So marked.)

Mr. Wehner: May I see it?

Mr. Burr: Sure.

(Pause.)

Mr. Burr: May I proceed, your Honor?

The Court: Why, of course.

Mr. Burr: Mr. Quinones, I show you what has been marked as Defendant's Exhibit 1 and ask if you can identify that, please.

Mr. Quinones: This is a document that was given to us, the attorney in Puerto Rico. He explained to me what this document was all about and he asked us to sign and bring it to Mr. Burr, and we understand that it was voluntarily signed or signed voluntarily.

Mr. Burr: Miss Figueroa, did you listen and understand what Mr. Quinones' statement just a moment ago was?

Miss Figueroa: Yes.

Mr. Burr: Is that your signature on the letter dated August 23, 1979, which has been marked as Defendant's Exhibit 1?

Miss Figueroa: Yes.

Mr. Burr: Mr. Quinones, is that your

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signature?

Mr. Quinones: Yes, it is.

Mr. Burr: Did you sign this letter after you had discussed this case with your attorneys in Puerto Rico?

Mr. Quinones: Yes.

Mr. Burr: Your Honor, maybe for clarification—I can certainly show this to your Honor, but would you permit me to read it into the record?

The Court: Of course.

Mr. Burr: It's a letter addressed to me at our law offices regarding this case and it says: "Dear Mr. Burr: We have been advised, hereby acknowledge and are aware that there is always the possibility of a conflict of interest between us which would require you as our attorney to sacrifice the cause of one at the expense of the other.

"However, we have discussed the facts of this case at length with you and are completely satisfied that our interests are identical and that the facts as we have given them to you do not admit of a conflict between us. While we recognize our right to be represented by separate counsel, we nevertheless

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request that you represent both of us in the above-entitled case."

At the risk of repetition, your Honor, I just might like to clarify now that the witnesses are under oath today and I am not implying that they weren't telling the truth yesterday but I think for emphasis, if not for clarification, I would like to ask both witnesses whether they discussed this case with me yesterday in my office.

Mr. Quinones: Yes.

Miss Figueroa: Yes.

Mr. Quinones: We were in his office from 9:00 o'clock until almost 2:00 o'clock.

Mr. Burr: During that time did we discuss the indictment and the charges contained in the indictment?

Mr. Quinones: Yes.

Miss Figueroa: Yes.

Mr. Burr: And did we discuss the possible defenses concerning the charges alleged in that indictment?

Miss Figueroa: Yes.

Mr. Quinones: Yes.

Mr. Burr: And did we discuss the

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possibility that the defense of you, Mr. Quinones, may be different from the defense or defenses of Miss Figueroa?

Mr. Quinones: Yes.

Mr. Burr: Did we come to the conclusion that there would be no conflict in the defense of you and Miss Figueroa?

Mr. Quinones: Yes.

Mr. Burr: Do you agree with that, Miss Figueroa?

Miss Figueroa: Yes.

Mr. Burr: Despite the possibility a conflict of interest may arise, are you, nevertheless, satisfied and willing to have me represent both of you in this case?

Mr. Quinones: Yes.

Miss Figueroa: Yes.

Mr. Burr: And are you both willing and do you both want me to represent you in this case even though I might be confronted with the same types of situations that Judge Pollak just explained to you today and are you willing to rely on my judgment as to how to resolve that conflict in protecting your interests?

[20]

Mr. Quinones: Yes.

Miss Figueroa: Yes.

Mr. Burr: Do you realize that the Sixth Amendment to the United States Constitution guarantees you the right to effective assistance of counsel?

Mr. Quinones: Yes.

Miss Figueroa: Yes.

Mr. Burr: Do you realize, do you both realize that if you waive this right you may be foregoing the issue of effective assistance of counsel on any appeal that may arise out of this case?

Mr. Quinones: Yes.

Miss Figueroa: Yes.

Mr. Burr: Do you realize that you are entitled to an attorney who represents only your individual interests?

Mr. Quinones: Yes.

Miss Figueroa: Yes.

Mr. Burr: Nevertheless, and despite the possibility of certain conflicts of interests arising during the course of this trial, you have confidence in my judgment?

Mr. Quinones: Yes.

[21]

Miss Figueroa: Yes.

Mr. Burr: And you do not desire to obtain separate counsel?

Mr. Quinones: No. We are satisfied with Mr. Burr.

Mr. Burr: I believe that's all the questions I have, your Honor.

The Court: May I inquire, Mr. Burr, with respect to the interview that was referred to in your office I think yesterday evening—is that right?

Mr. Burr: During the day yesterday, most of the day.

The Court: During the day?

Mr. Burr: During the day.

The Court: The reference to 9:00 o'clock to 2:00 o'clock was during the day?

Mr. Burr: Oh, yes.

The Court: That was an interview in which you were talking with Miss Figueroa and Mr. Quinones and Mr. Sanchez was there?

Mr. Burr: That's right, your Honor. Mr. Sanchez who was here yesterday, a member of the Bar of the United States Supreme Court and a member of

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the Bar of Puerto Rico, accompanied Mr. Quinones and Miss Figueroa to my office. As a matter of fact, I met them early in the morning and we discussed this case for approximately, I would say, four and a half hours, reviewing the indictment, reviewing the charges, going over the evidence which has been turned over to this point in time by the Government, discussing possible defenses and exploring areas and hypothetical situations which would present a clear conflict of interest and discussing with them in the presence also of their Puerto Rican counsel of what should be done in the event that those situations arise.

I might say to the Court that I think it's a fair characterization that at least 50 percent of our conversation and our discussion was oriented toward the possibility of a conflict of interest arising and based on the information provided to me by the Government, based on the facts presented to me by Miss Figueroa and Mr. Quinones, as well as their counsel, they seem satisfied not only that a conflict will not arise, they are aware, I'm sure, of what a conflict is and what it may mean but they are, nevertheless, and in the unlikely event that a conflict does arise,

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they have expressed the sincere and earnest desire that I continue to represent them both.

The Court: I think I hardly need say, Mr. Burr, that I am very impressed by the care and consciousness with which you have approached this difficult problem and, conversely, I think the attention your clients have given you.

I remain unsatisfied within what I think is the rubric that's imposed on me by the Court of Appeals in last year's decision in the *Dolan case in 570 F. 2d* I can make the necessary finding of waiver of a knowing and intelligent sort that, which is constitutional norms, and that notwithstanding your representations, Mr. Burr, and this letter which you have given me, Defendant's Exhibit 1, but before ruling dispositively on this, I would like to hear from the Government.

The Government, as an initial matter, has at least taken the position this was a matter of strong concern and that in all probability the standards set by the Court of Appeals couldn't be met; at least that's a fair characterization of the Government's position. If it isn't, the Government will correct me. But it may be that the Government was persuaded by you, Mr. Burr, and your clients as I have not yet been,

[24]

and if the Government takes a different view at least I would—that is, a different view from the one that tentatively I lean toward, I would want to know it since, after all, the Government is not just an adversary. The Government has obligations to protect the constitutional rights of the defendants and, therefore, has a view as to whether, if I were now to conclude that you, Mr. Burr, couldn't represent both of these defendants simultaneously I would be overriding their rights to counsel of their choice.

* * *

[28]

The Court: Mr. Burr, let me just very briefly respond, and I will give the Government something additional to shoot at.

I recognize that the Court of Appeals has not promulgated a per se rule, at least in terms, but the Court of Appeals has said, I think, and indeed I'm sure, that it is not enough to find a waiver, indeed a fully meant, sincerely understood, earnestly promoted waiver, which is I think what we have here. I have no question of the sincerity of the defendants and of their sense that they perceive the realities of the situation and the potentialities of the situation and their willingness to forego the full range of independent representation. I have no doubt about any of that, but I think the Court of Appeals has quite clearly said in Dolan that there may be instances in which the trial judge concludes that it cannot accept what has all the earmarks of being a full waiver as a satisfactory waiver because the judge concludes that

[29]

the state of knowledge which the Court has, which counsel have, which the defendants themselves have at an early phase of the case may be so limited that to say this is an intelligent penetration of the issues and an intelligent sacrifice of long-term interests is to engage in a non-persuasive exercise.

I feel myself to be in that situation where the Court of Appeals says implicit in this inquiry procedure is the possibility that a trial judge may not be satisfied that the

waiver is proper. For example, a defendant may be competent enough to stand trial but not competent enough to understand the complex, subtle and sometimes unforeseeable dangers inherent in multiple representation. More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him. All of this is on Page 1181 of Volume 57 F. 2d.

That is substantially the situation that I see presented here and, in reaching that conclusion, as I say, it's a tentative conclusion pending hearing from the Government but I am not willing to settle, Mr. Burr, for the representation which you have properly

[30]

made that the waiver which has been tendered in effect protects against these defendants being able at some later stage to claim lack of effective representation of counsel if there were to be a conviction because I think what's at stake here is, insofar as an obligation is imposed on the trial judge to make a ruling, what's at stake is not my protecting a record. I think my job is a broader one here than that. I think my obligation is to make as sure as I can in advance of the trial that the trial, when it takes place, is as fully and vigorously fought out as the adversary process contemplates and, of course, this would mean that I am arrogantly, one may say, sacrificing putting at naught the felt preferences of the defendants who, as you have properly pointed out, want you, both of them want you as their lawyer, and quite understandably so, and I'm willing to accept that that's both a product of their confidence in you and their common sense of identity as warm friends and comrades.

I'm prepared, following what I believe to be, whether we call it guidance or not, at least the essential meditations of the Court of Appeals as to this kind of situation, to put that at naught and to do so, Mr. Burr, in effect saying not only to you but

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to your clients that I can't give Miss Figueroa and Mr. Quinones, both of them, Mr. Burr. One of them can have Mr. Burr. Another must be satisfied with another lawyer who is not Mr. Burr but who is a very competent lawyer too and to the extent that the defendants separately do not have the financial capacity each to hire and retain for a long trial private counsel then, of course, it becomes the Court's obligation to appoint counsel at Government expense.

That is the situation I see on the basis of the colloquy we had, a colloquy which has elicited on the one hand an anticipation which you have voiced, Mr. Burr, and I think Mr. Quinones, but most particularly I think Miss Figueroa, that, in fact, as things will develop there will not be any conflict, the underlying facts of the situation don't lend themselves to that, but that surely is a prediction which I don't feel equipped to rely on; but alternatively, that if any of these hypothetical conflicts or others which we could imagine but did not explore in the questioning were to emerge, that your clients would be satisfied with your, Mr. Burr's, professional capacity and skill and dedication to

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resolve them. In putting at naught their confidence in you to do that, saying that I'm preparing to rule against them and you in this respect, subject for a moment to the Government's view—I will let them speak in a moment—I want it absolutely clearly understood that none of this is

meant to disparage or belittle the skills you would bring to this and which you will, in any event, bring to it on behalf of one of these persons, Mr. Burr. It's only to say that I don't think the criminal trial process ought to be burdened with what would seem to me a virtually insoluble and perhaps absolutely insoluble stress that might arise if it's avoidable, as clearly it can be avoided by the appointment or retention of other counsel for one of these two persons.

* * *

[40]

The Court: I conclude that Mr. Quinones and Miss Figueroa—I will not permit Mr. Burr to continue to represent you both. I will ask you two to determine in consultation with Mr. Burr which of the two of you will continue to be represented by Mr. Burr during the pretrial and trial and if there are any postrial phases of this case. I will ask Mr. Burr to continue to represent the other one of you until such time as, with his assistance, arrangements can be made for another attorney to represent that one of you whom Mr. Burr will not be representing throughout the later stages of this case and I would repeat that if whichever of you requires the selection of a new lawyer cannot afford to retain a lawyer then, with Mr. Burr's assistance, an application can be made to this Court for the appointment at Government expense of a very

[41]

capable lawyer.

I have come to the conclusion that I cannot permit Mr. Burr to continue the dual representation in this case because, without in any way questioning the sincerity and the care with which Mr. Quinones and Miss Figueroa approach the question of waiver, a waiver which they have

attempted to embody in their letter of August 23 to Mr. Burr, which is Defendant's Exhibit 1, I, nonetheless, conclude that this is an instance in which, within the meaning of the Court of Appeals' ruling in Dolan, 570 F. 2d 1177 at 1181 to 1183, I cannot properly find a knowing and intelligent waiver of the very precious constitutional right to effective representation of counsel.

I conclude this because I find that at this stage of this case I can hypothesize conflicts of interest which are potential, some of which I have put to these defendants, but I cannot satisfy myself that these potential conflicts or others are only theoretical and abstract and have no likelihood of occurring. My information is not sufficient to be able to help the defendants more than I have tried to do today to speculate on the possibilities of conflict.

Though I am sure Mr. Burr is better informed

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than I, I find that at this stage he too is not able to do more than give partial guidance to these defendants as to the conceivable occasions for divergence of interests between them. For these reasons I feel impelled now to override the express preference of Mr. Quinones and Miss Figueroa both to be represented by the same able counsel.

Wherefore I conclude that, with great gratitude to Mr. Burr, I must ask him to step aside as counsel for one of these two defendants as soon as he has been able to make appropriate provision for the substitution of new counsel.

* * *

EXHIBIT D-1.

August 23, 1979

Charles B. Burr, II, Esquire
Griffith & Burr, P. C.
Suite 200
800 Chestnut Street
Philadelphia, Pennsylvania 19107

RE: United States of America vs. William Antonio Quinones a/k/a "Chengo" and Candida Figueroa, et al. Crim. No. 79-139

Dear Mr. Burr:

We have been advised, hereby acknowledge and are aware that there is always the possibility of a conflict of interest between us which would require you, as our attorney, to sacrifice the cause of one at the expense of the other.

However, we have discussed the facts of this case at length with you and are completely satisfied that our interests are identical and that the facts as we have given them to you do not admit of a conflict between us. While we recognize our right to be represented by separate counsel, we nevertheless request that you represent both of us in the above entitled case.

Very truly yours,

/s/ WILLIAM A. QUINONES
William Antonio Quinones
/s/ CANDIDA FIGUEROA
Candida Figueroa

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 79-139

UNITED STATES OF AMERICA

v.

WILLIAM ANTONIO QUINONES
a/k/a CHENGO, a/k/a WILLIE
and
CANDIDA FIGUEROA

ORDER

On September 4 and 5, 1979, I held a pre-trial hearing in this case pursuant to the Government's Motion of August 27, 1979, "TO DETERMINE WHETHER DEFENDANTS QUINONES AND FIGUEROA, DUE TO JOINT REPRESENTATION, MAY BE PREVENTED FROM RECEIVING ADVICE AND ASSISTANCE OF COUNSEL SUFFICIENT TO AFFORD THEM THE QUALITY OF REPRESENTATION GUARANTEED BY THE SIXTH AMENDMENT." At that hearing, Mr. Quinones and Ms. Figueroa sought to establish, through counsel and by testimony, (a) their awareness of the theoretical possibility of conflicts of legal interest between them, (b) their sense of assurance that such possible conflicts would be extremely unlikely to materialize in fact, (c) their confidence that their jointly retained attorney, Charles B. Burr, Esquire, would satisfactorily handle any such conflict

as might materialize, and (d) their very strong preference to have Mr. Burr continue as attorney for both of them. I concluded nonetheless, on the basis of that hearing and for reasons stated from the bench, that I could not satisfy myself that Mr. Quinones and Ms. Figueroa had made the "knowing and intelligent waiver" of their rights to effective assistance of counsel contemplated by *United States v. Dolan*, 570 F. 2d 1177 (3d Cir. 1978). Accordingly, it is this 6th day of September, 1979,

ORDERED

that Charles B. Burr, Esquire withdraw from the representation of either William Quinones or Candida Figueroa in this case as soon as arrangements have been made for one of them to retain new counsel and such new counsel shall enter an appearance.

/s/ Louis H. Pollak
Louis H. Pollak

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2310

UNITED STATES OF AMERICA

v.

QUINONES, WILLIAM ANTONIO
a/k/a Chengo a/k/a Willie, *Appellant*

(D. C. Crim. No. 79-00139-08)

No. 79-2311

UNITED STATES OF AMERICA

v.

FIGUEROA, CANDIDA
Candida Figueroa, *Appellant*

(D. C. Crim. No. 79-00139-11)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted November 13, 1979
Before: GIBBONS, HIGGINBOTHAM and SLOVITER,
Circuit Judges

Opinion on Motion by Appellee for Summary Affirmance

(Filed: January 17, 1980)

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OPINION OF THE COURT

PER CURIAM:

Appellants, William Antonio Quinones and Candida Figueroa, appeal from a pretrial ruling that they could not have the same counsel because the district court was not satisfied that they "had made the 'knowing and intelligent waiver' of their rights to effective assistance of counsel contemplated in *United States v. Dolan*, 570 F. 2d 1177 (3d Cir. 1978)." *United States v. Quinones*, D. C. Crim. Nos. 79-139-08 and 11 (E. D. Pa. Sept. 6, 1979).

Upon reading the record of the trial judge's patient and detailed two-day hearing, we will affirm his ruling.

I.

William Antonio Quinones and Candida Figueroa were indicted, along with ten other defendants, on May 31, 1979 in a twelve-count indictment charging a conspiracy to engage in the unlawful traffic of heroin in violation of 21 U. S. C. §§ 841(a)(1), 843(b), and 952(a), and related substantive offenses.

Both Quinones and Figueroa are named in Count One, the conspiracy count of the indictment. Overt Act No. 15 states that from December 1976 to February 1977 defendants Quinones and Figueroa traveled to Philadelphia, Pennsylvania from Chicago, Illinois. Paragraph 4(h) on pages 4 and 5 of the indictment alleges, in part, that in order to further the objects of the conspiracy, defendant Quinones directed and supervised defendant Figueroa in the acceptance of requests for purchases of heroin, the arrangement of deliveries of heroin, the acceptance of payment for delivery of heroin, and the delivery of heroin.

On August 27, 1979, upon learning that defendants Quinones and Figueroa intended to be jointly represented by Charles B. Burr, II, the government filed a motion for a pretrial hearing to determine if these two defendants would be denied their sixth amendment right to effective assistance of counsel if they continued with joint representation, and if so, to determine if a knowing and intelligent waiver of that right would be elicited.

On September 4 and 5, 1979, Judge Louis H. Pollak conducted a hearing pursuant to this court's decisions in *United States v. Dolan*, 570 F. 2d 1177 (3d Cir. 1978)

(Rosenn, J.), and *United States ex rel. Hart v. Davenport,* 478 F. 2d 203 (3d Cir. 1973) (Gibbons, J.)

Appellants argued at the hearing that they have a constitutional right to be represented jointly by counsel of their choice and to waive certain Sixth Amendment guarantees which might otherwise protect them. The government argues that if it acquiesced in allowing them to proceed with joint representation it would be fostering clearly reversible error which would result in needless and protracted litigation. On September 5, 1979, Judge Pollak ruled that a potential conflict of interest existed. He further ruled that he could not properly find a knowing and intelligent waiver of the defendants' constitutional right to effective representation.

On September 12, 1979, the appellants filed a notice of appeal from that ruling. Because of the appeal, the trial has been delayed, and the government has therefore filed a notice for summary affirmance.

In *United States ex rel. Hart v. Davenport,* this court ordered the issuance of a writ of habeas corpus, thereby invalidating a state court conviction where a single defense attorney, retained by all of the defendants' employers, had represented the petitioner, two employers and three other co-defendants. There we emphasized:

> The legal standard to be applied to a claim of prejudice from joint representation is clear enough. The right to counsel guaranteed by the sixth and fourteenth amendments contemplates the service of an attorney devoted solely to the interests of his client. The right to such untrammelled and unimpaired assistance applies both prior to trial in considering how to plead, *Von Moltke v. Gillies,* 332 U. S. 708, 68 S. Ct. 316, 92 L. Ed 309 (1948), and during trial, *Glasser v. United States,* 315 U. S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680 (1942). Recognizing that the right to such assistance of counsel may be waived, *e.g., Adams v. United States ex rel. McCann,* 317 U. S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942), we have refused to find any such waiver from a silent record. . . . [W]e have rejected the approach that before relief will be considered the defendant must show some specific instance of prejudice. . . . Instead, we have held that upon a showing of a possible conflict of interest or prejudice, however remote, we will regard joint representation as constitutionally defective.

Id. at 209-10.

In *United States v. Dolan,* we noted with precision the procedure that a trial judge must follow in such cases.

> The waiver of effective assistance of counsel which the *Davenport* rule facilitates is subject to the limitations established earlier by the Supreme Court in *Johnson v. Zerbst,* 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), and *Brady v. United States,* 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), that a waiver of a constitutional right must be made knowingly, intelligently, and with awareness of the likely consequences of the waiver. Whether the waiver is intelligent and competent "should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." For a trial judge to find that a waiver is knowing and intelligent, he must be satisfied that the defendant is aware of the foreseeable prejudices his attorney's continued representation could entail for his trial, and possible detrimental consequences of those prejudices.
>
> • • •
>
> Implicit in this inquiry procedure is the possibility that a trial judge may not be satisfied that the

> waiver is proper. For example, a defendant may be competent enough to stand trial, but not competent enough to understand the complex, subtle, and sometimes unforeseeable dangers inherent in multiple representation. More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him.

Id. at 1181 (citations and footnotes omitted).

Most recently, in *United States v. Rad-O-Lite of Phila., Inc.*, No. 79-1551 (3d Cir. December 28, 1979) (Seitz, C. J.), we again recognized this requirement that the district court scrutinize potential conflicts of interest in joint representation of counsel. We stated that "[t]he district court bears a substantial responsibility for ensuring that conflicts of interest resulting from joint representation do not deprive the accused of a fair trial." *Slip Op.* at 7.

Judge Pollak applied the precepts of *Dolan* and *Davenport*. His findings are not clearly erroneous. We will grant the government's motion for summary affirmance and will affirm the order of the district court requiring Burr to withdraw from representation of either William Quinones or Candida Figueroa.[1]

1. Judge Gibbons, while he agrees with this opinion insofar as it discusses the merits of the appeal, does not agree that the case was one which required summary disposition. He would have denied the government's motion for summary affirmance and permitted the appeal to proceed on a normal briefing schedule.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 79-2310/79-2311

UNITED STATES OF AMERICA

v.

QUINONES, WILLIAM ANTONIO
a/k/a Chengo a/k/a Willie,
Appellant in No. 79-2310

UNITED STATES OF AMERICA

v.

FIGUEROA, CANDIDA
Candida Figueroa,
Appellant in No. 79-2311

(D. C. Criminal No. 79-00139-08 and 11)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, HIGGINBOTHAM and SLOVITER,
Circuit Judges

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District

of Pennsylvania and was submitted on motion by appellee for summary affirmance on November 13, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the government's motion is granted and the judgment of the said District Court, filed September 6, 1979, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

January 17, 1980

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2310

UNITED STATES OF AMERICA

v.

QUINONES, WILLIAM ANTONIO
a/k/a Chengo a/k/a Willie, *Appellant*

No. 79-2311

UNITED STATES OF AMERICA

v.

FIGUEROA, CANDIDA
Candida Figueroa, *Appellant*

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Dated: February 11, 1980

Supreme Court, U.
FILED
APR 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1323

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM ANTONIO QUINONES AND CANDIDA FIGUEROA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1323

WILLIAM ANTONIO QUINONES AND CANDIDA FIGUEROA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A25-A30) is reported at 613 F. 2d 47.

JURISDICTION

The judgment of the court of appeals (Pet. App. A31-A32) was entered on January 17, 1980. A petition for rehearing was denied on February 11, 1980 (Pet. App. A33-A34). The petition for a writ of certiorari was filed on February 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in refusing to permit petitioners to be represented by the same attorney after it found a substantial possibility of conflicting defenses that petitioners did not fully understand.

STATEMENT

On May 31, 1979, petitioners were indicted, along with ten other defendants, in a 12-count indictment charging a conspiracy to engage in the unlawful traffic of heroin, in violation of 21 U.S.C. 841(a)(1), 843(b) and 952(a), and related substantive offenses. Both petitioners were named in count 1, the conspiracy count. Petitioner Quinones was also named in count 10, which charged him and two others with possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner Figueroa was not named in any other count.

The conspiracy count charges, *inter alia*, that Ismael Pagan Quinones (petitioner Quinones' brother) organized several individuals for the purpose of accepting a supply of heroin in Chicago that had been smuggled into the United States from Mexico and delivering the heroin for sale in Philadelphia. As one overt act, the indictment alleges that from December 1976 to February 1977, petitioners traveled to Philadelphia from Chicago. Paragraph 4(h) of the indictment alleges, in part, that in order to further the objects of the conspiracy, petitioner Quinones directed and supervised petitioner Figueroa in accepting requests for purchases of heroin, in arranging deliveries of heroin, and in accepting payment for the "goods" and making deliveries. In addition, paragraph 4(g) of the indictment alleges that petitioner Quinones was assigned by his brother to supervise the Quinones organization in the latter's absence.

On August 27, 1979, upon learning that petitioners intended to be jointly represented by the same counsel, the government requested a pretrial hearing to determine if joint representation would jeopardize petitioners' Sixth

Amendment right to the effective assistance of counsel, and if so, whether petitioners were capable of a knowing and intelligent waiver of that right.

A hearing was held on this motion on September 4 and 5, 1979. At the first day's proceedings, defense counsel, Charles Burr, informed the court that he had discussed with petitioners that morning the possibility of a conflict of interest and that petitioners had informed him that their defenses did not conflict. Counsel also informed the court that petitioners were prepared to waive their Sixth Amendment rights even if there were some possibility that a conflict of interest would develop (1 H. 13-15).[1] Defense counsel agreed with the court's observation that, on the face of the indictment, the situation was "pregnant with potential conflict" because of the allegation that Quinones had supervised Figueroa's activities, but counsel informed the court that petitioners had assured him that the charges were not true (1 H. 15-16).

The court then questioned petitioners in order to determine their ability to appreciate the risks inherent in joint representation. In particular, he questioned them concerning their understanding of the charges brought against each of them, their understanding of what constituted a conflict of interest, and the various ways in which such a conflict could develop (1 H. 23-28, 32-36). Certain of petitioners' responses seemed to indicate that

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[1] "1 H." refers to the transcript of that portion of the hearing held on September 4, 1979; "2 H." refers to the transcript of that portion held on September 5, 1979. Most of the transcript of the September 5 hearing is reprinted in the appendix to the petition for a writ of certiorari, at A1-A21.

they did not fully comprehend the scope of the problem.[2] Believing that a part of the problem might be in petitioners' inability to express themselves fluently in English, the court adjourned the hearing until the following day, when an interpreter could be present (1 H. 37-38).

The following day, the court continued its questioning of petitioners with an interpreter's assistance. Again petitioners' responses to the court's questions failed to satisfy the court that petitioners fully grasped the risks attendant on joint representation (2 H. 15; Pet. App. A10).[3] Petitioners nonetheless insisted that their defenses did not conflict, but that even if a conflict developed, they

---

[2]For instance, in response to the court's query whether he saw any possible conflict of interest in paragraph 4(h) of the indictment, which charged him with directing and supervising Figueroa in the alleged heroin transactions, Quinones replied (1 H. 33) that he saw no possible conflict of interest. Figueroa, when presented by the court with a hypothetical situation in which her defense might differ from that of Quinones, replied (1 H. 35): "Well, I understand what you mean, but I don't see no possibility of conflict of interest because I want him to be my lawyer."

[3]When the court asked Quinones to describe the charges against Figueroa, Quinones incorrectly replied that the indictment charged Figueroa with conspiracy "to distribute and to supervise and arrange" deliveries of heroin (2 H. 7; Pet. App. A4). The court then presented Quinones with a hypothetical situation in which his defense might conflict with that of Figueroa. Quinones stated that he could see in that situation the possibility of a conflict of interest, but that he would "leave that in the hands of the attorney for him to decide" (2 H. 11; Pet. App. A7; see also 2 H. 14; Pet. App. A9). The court then asked Figueroa what she would want counsel to do in the event she decided to change her plea to guilty under circumstances that would require her to testify against Quinones and the other defendants. Figueroa replied (2 H. 15; Pet. App. A10): "I think I'm not sure that Mr. Burr has the skills and the honesty and he would be willing to provide the same type of defense for both of us."

still wanted Burr to represent them (2 H. 7-15; Pet. App. A4-A10). In addition, Burr presented the court with a letter dated August 23, 1979 from petitioners to Burr (Pet. App. A22), which stated that they were aware of the possibility of a conflict that might require Burr to sacrifice the interests of one for the sake of the other; that they had discussed the facts of the case with Burr and were satisfied that their interests were identical; and that they recognized they had a right to separate counsel but wanted Burr to represent them both (2 H. 16-18; Pet. App. A10-A12). Finally, in response to questioning by Burr, petitioners stated that they understood their Sixth Amendment right to the effective assistance of counsel, that they wanted Burr to represent them "even though [he] might be confronted with the same types of situations" the court had explained, and that they realized they might be losing their right to raise the issue of effective assistance of counsel on appeal if they waived that right at the pretrial hearing (2 H. 19-20; Pet. App. A13-A14).

The court refused to find that petitioners had knowingly and intelligently waived their right to the effective assistance of counsel. The court concluded (2 H. 37) that given the circumstances, including the language problem, it could not "conclude that [petitioners had] that detailed and systematic comprehension and apprehension of the way the record [might] develop and what conflicting tactics [might] emerge" necessary to constitute a waiver. The court accordingly ordered Burr to discontinue his representation of one of the petitioners (2 H. 40, 42-43; Pet. App. A20-A21, A23-A24).

ARGUMENT

Petitioners contend (Pet. 5-12) that the decision of the court below implicitly establishes a per se rule that disqualifies counsel under all circumstances from representing more than one defendant in a criminal case, even when the defendants have expressed willingness to relinquish their right to conflict-free representation. We believe that there would be much to command such a per se rule, at least where there is a real possibility that the lawyer would labor under a conflict of interest.[4] That

[4]Petitioners appear to argue (Pet. 6) that they have a constitutional right to be represented by the same attorney even if joint representation would concededly give rise to a conflict of interest for the attorney. We disagree. A defendant has a Sixth Amendment right to forgo the assistance of counsel altogether and to represent himself in criminal proceedings. *Faretta* v. *California*, 422 U.S. 806 (1975). But it does not follow that a defendant who chooses to be represented by counsel has the constitutional right to "counsel of his choice" where the court finds that counsel would be burdened with a conflict of interest.

In our view, the Court's decision in *Faretta* is not premised on a Sixth Amendment right to waive the assistance of counsel, from which the right petitioners assert to waive the *effective* assistance of counsel might be implied. Rather, the right to appear personally is an independent right founded in the Sixth Amendment, which generally confers on the defendant the right to make his own defense. 422 U.S. at 819; see *United States* v. *Dolan*, 570 F. 2d 1177, 1183 (3d Cir. 1978). One of the means available to the defendant in making his defense is to invoke the assistance of counsel. When a defendant chooses to be represented by counsel, however, he necessarily accepts reasonable limitations on the availability, qualifications, and conduct of counsel, including ethical standards necessary to preserve the fairness and integrity of the administration of justice and the appearance of such fairness and integrity. Thus, although courts should not lightly interfere with a defendant's selection of a lawyer to represent him, there is a strong, countervailing public interest in ensuring that attorneys who appear as officers of the court and participate in the administration of the criminal justice system are not

issue is not raised in the present case, however, because the court of appeals did not purport to rule that multiple defendants can never be represented by the same counsel whenever the lawyer may have a conflict of interest; rather, it simply held that on the facts of this case the district court did not commit clear error in finding that petitioners had not made a knowing and intelligent waiver

burdened with conflicting loyalties to the clients they represent. Cf. *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F. 2d 652, 658 (4th Cir. 1977).

In this connection, the American Bar Association, in its *Standards Relating to the Administration of Criminal Justice, The Defense Function* (1974), cautions that a lawyer "should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another." § 3.5(b), at 123, quoted in *Holloway* v. *Arkansas*, 435 U.S. 475, 486 n.8 (1978). The *Standards* regard the potential for a conflict in multiple representation to be "so grave" that the lawyer should decline such representation except in unusual circumstances when, "after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation." *Ibid.* See also *ABA Code of Professional Responsibility* DR 5-105 (1978). In the present case, as the district court found, it is not "clear that no conflict is likely to develop."

Thus, we believe the district court in the present case could properly have declined to allow Burr to represent both petitioners even if it concluded that their waivers were knowing and intelligent. But see, *e.g.*, *United States* v. *Garcia*, 517 F. 2d 272, 276-277 (5th Cir. 1975). There is no need to reach that issue here, however, because the district court was correct in finding that petitioners' waiver was not a knowing and intelligent one.

of their right to conflict-free counsel. This largely fact-bound issue does not warrant review by this Court.[5]

Representation by an attorney unencumbered by potentially conflicting interests is an important part of the Sixth Amendment right to the effective assistance of counsel. Of course, that right, like other constitutional rights, may be waived (*Glasser* v. *United States*, 315 U.S. 60, 70-71 (1942); *United States* v. *Alvarez*, 580 F. 2d 1251, 1259 (5th Cir. 1978); *United States* v. *Dolan*, 570 F. 2d 1177, 1181 (3d Cir. 1978); see *Holloway* v. *Arkansas*, 435 U.S. 475, 483 n.5 (1978)), although, as we discuss in note 4, *supra*, we do not believe a court is obliged to accept such a waiver. To be acceptable, however, the waiver must be made knowingly, intelligently, and with a full awareness of its likely consequences. *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938). Moreover, for the trial court to find that a waiver is knowing and intelligent, it

[5]The court of appeals did not address the question of its jurisdiction to entertain petitioners' pretrial appeal of the order disqualifying their attorney from representing both petitioners at trial. Although there is authority for the proposition that an order disqualifying counsel in a criminal trial is appealable under 28 U.S.C. 1291 (see *In re Benjamin*, 582 F. 2d 121, 124 (1st Cir. 1978) (dictum); *United States* v. *Garcia*, 517 F. 2d 272, 275 (5th Cir. 1975)), and that disqualification orders in civil cases are likewise appealable (see, *e.g.*, *Board of Education* v. *Nyquist*, 590 F. 2d 1241, 1247 n.8 (2d Cir. 1979); *Aetna Casualty & Surety Co.* v. *United States*, 570 F. 2d 1197 (4th Cir.), cert. denied, 439 U.S. 821 (1978); *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F. 2d 602 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978)), this Court has not decided whether such orders would be effectively unreviewable on appeal from a final judgment of conviction and therefore within the collateral order exception to the final judgment rule under 28 U.S.C. 1291. Compare *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468-469 (1978), with *Abney* v. *United States*, 431 U.S. 651 (1977). There is no need to address that question here, however, because the court of appeals properly rejected petitioners' claim on the merits.

"must be satisfied that the defendant is aware of the foreseeable prejudices his attorney's continued representation could entail for his trial, and possible detrimental consequences of those prejudices." *United States* v. *Dolan*, *supra*, 570 F. 2d at 1181. See also *United States* v. *Carrigan*, 543 F. 2d 1053, 1055 (2d Cir. 1976); *United States* v. *Gaines*, 529 F. 2d 1038, 1043-1044 (7th Cir. 1976); *United States* v. *Garcia*, 517 F. 2d 272, 278 (5th Cir. 1975). Such a determination, in turn, depends upon the particular facts and circumstances of each case, including the background, experience and conduct of the accused. *Glasser* v. *United States*, *supra*, 315 U.S. at 70-71; *Johnson* v. *Zerbst*, *supra*, 304 U.S. at 464-465.

Here, upon being informed by the government of the potential conflict of interest, the district court conducted an exhaustive inquiry into the matter.[6] That inquiry revealed a substantial possibility that an actual conflict of interest might develop in connection with a guilty plea or at trial. Indeed, defense counsel admitted to the district court that the indictment, as drawn, was "pregnant with potential conflict" because of the allegation that Quinones

[6]Petitioners are correct in pointing out (Pet. 10-11) that the courts of appeals differ regarding the duty of the trial court to make inquiry of jointly represented defendants concerning conflicts of interest. This disagreement among the circuits is not relevant here, however, as petitioners do not contest the propriety of the district court's decision to hold a hearing on the possibility of conflict. We also note that any disagreement among the circuits may be resolved by Rule 44(c) of the proposed amendments to the Federal Rules of Criminal Procedure. That proposed rule states, in pertinent part, that in cases of joint or multiple representation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."

had supervised Figueroa's activities.[7] Thus, although defense counsel assured the court that petitioners' planned defenses did not conflict, the court, under these circumstances, had a special duty to assure that any waiver made by petitioners was knowing and intelligent. See, *e.g.*, *United States* v. *Bernstein*, 533 F. 2d 775, 788 (2d Cir. 1976).

Despite petitioners' repeated assertions that they recognized the possibility that a conflict might arise at trial which would force their attorney to sacrifice the interests of one of them in order to protect the other, petitioners' replies to many of the court's questions quite plainly showed that in fact they did not fully appreciate the gravity of the problem or the import of their attempted waiver. See notes 2 and 3, *supra*. Nor did the district court feel that, given the admitted potential for conflict apparent from the face of the indictment, it was in a position accurately to determine the likelihood that such a conflict would occur. Moreover, as the district court stated (1 H. 38), petitioners' difficulty with the English language was "an enormous additional problem which [it] can't just ignore." Based on these circumstances, the district court stated that it was unable to conclude that

[7]Further, in a portion of the transcript of the second day's proceedings not reprinted in the appendix to the petition for a writ of certiorari, counsel informed the court that petitioners could not afford separate counsel, that they developed confidence in him "knowing full well [he] might have to compromise those interests" if the hypothetical situations the court described should arise, and that he agreed that he was put "in a difficult position" (2 H. 25-26).

petitioners had made a knowing and intelligent waiver of their right to conflict-free counsel.[8]

The district court, which alone personally observed petitioners, their interaction with each other and with attorney Burr, and their immediate understanding (or lack of understanding) of the subtle difficulties joint representation might have created, was uniquely well situated to rule on the question. The difficulties of joint representation may go unappreciated even by sophisticated defendants, because of what they "tend[] to *prevent* the attorney from doing." *Holloway* v. *Arkansas*, *supra*, 435 U.S. at 489-490 (emphasis added). These problems—such as the failure to explore plea negotiations for one client that may come at the expense of the other, or failure to challenge the admission of evidence favorable to one but damaging to the other—would be all the more difficult to detect, much less anticipate, by petitioners in this case, who were only marginally able to use the English language. The court of appeals was thus correct in endorsing the district court's factual determination, and there is no reason for further review.

[8]Petitioners claim (Pet. 12-14) that the district court failed to articulate its reasons, or make adequate findings, to support its refusal to accept petitioners' waiver. This contention is without merit. Although the district court, in its September 6, 1979 order requiring Burr to withdraw from the representation of one of the petitioners, did not state its reasons for concluding that petitioners had not made a knowing and intelligent waiver of their right to the effective assistance of counsel, the court clearly stated that its conclusion was based on the findings it made during the September 4 and 5 hearings. As outlined above (see pages 3-5, *supra*), these findings were ample to support the district court's ruling on this issue.

Finally, petitioners' contention to the contrary notwithstanding (Pet. 13), the district court's disposition does not amount to a ruling that defendants may never waive conflict-free representation (but see note 4, *supra*). As the court below noted (Pet. App. A29-A30, quoting *United States* v. *Dolan*, *supra*, 570 F. 2d at 1181):

> "Implicit in [an inquiry procedure looking towards the competence of such a waiver] is the possibility that a trial judge may not be satisfied that the waiver is proper. For example, a defendant may be competent enough to stand trial, but not competent enough to understand the complex, subtle, and sometimes unforeseeable dangers inherent in multiple representation. More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him.

In the circumstances of this case, as the court of appeals concluded, the district court's finding on this issue was not clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1980

DOJ-1980-04

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1323

WILLIAM ANTONIO QUINONES a/k/a CHENGO
a/k/a WILLIE and CANDIDA FIGUEROA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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I.

To Protect Petitioners' Sixth Amendment Right to Retain Counsel of Their Choice and to Guarantee the Orderly Administration of Justice This Court Must Establish Uniform Criteria for the Determination of a "Knowing and Intelligent" Waiver in the Context of Relinquishing Conflict-Free Representation Prior to Trial.

The United States, in its opposing Brief in No. 79-1323, clings tenaciously to its repeated reluctance to accept this Court's premise in *Holloway v. Arkansas,* 435 U. S. 475 (1978) that a defendant may waive his right to assistance of counsel who is free from any conflict of interest. The decisions below, both of the United States District Court for the Eastern District of Pennsylvania and of the United States Court of Appeals for the Third Circuit affirming the District Court, ignore the Third Circuit's own rule, as set forth in *United States ex rel. Hart v. Davenport,* 478 F. 2d 203 (3rd Cir. 1973) which recognizes that the right to effective assistance of counsel may be waived provided the dangers of joint representation are explained, as they were in this case, to the defendants at the earliest possible time in the proceedings. *Id.* at 210-211. *Cf., Sullivan v. Cuyler,* 593 F. 2d 512 (3rd Cir.), *cert. granted,* 100 S. Ct. 44, 48 U. S. L. W. 3217 (No. 78-1832) (1979) (raising Sixth Amendment issues concerning the right to effective counsel in conflict of interest situations in the post-trial context).

In the instant case the trial judge, not satisfied by counsel's assurances alone, conducted a thorough examination of each Petitioner on the record in which he explained, inter alia, the seriousness of the charges, the possibility at trial that the best protection of the interest of one defendant may be different from the protection of the interests of

the other defendant who is represented by the same counsel, and the right of each defendant to separate counsel. Both defendants were required to address the court personally, assured the trial court that they understood what was being said, and unequivocally reaffirmed their desire to remain with present counsel (Pet. App. A3-A10; A12-A15). In addition, both Petitioners signed, with the advice and in the presence of Puerto Rican counsel, a letter acknowledging the possibility of a conflict of interest but nevertheless requesting representation by the same counsel (Pet. App. A10-A12; A22). Despite the trial court's sensitivity to the theoretical possibility of a conflict of interest, despite the trial court's searching inquiry by careful and explicit questioning, and despite the unconditional nature of Petitioners' choice to be represented jointly, the trial court concluded, without articulating reasons or making adequate findings, that Petitioners could not make a knowing and intelligent waiver of their Sixth Amendment right to effective assistance of counsel. This conclusion, in addition to being contrary to the law in the Third Circuit and conflicting with decisions in other circuits, is self-serving, arbitrary and not supported in the record.

Petitioners are dismayed that a United States District Judge, as here, can so broadly read the concerns of the United States Court of Appeals for the Third Circuit in *United States v. Dolan*, 570 F. 2d 1177 (3rd Cir. 1978) as to make it quite literally impossible for them to prove an understanding and waiver of their Sixth Amendment rights in a way which will gain them what they most earnestly need and have conscientiously chosen: joint representation. Such representation cannot be shown, other than by the most unreasonably imaginative conjecture, to be an "insoluble stress" at trial. To say, on the facts of this case, that Petitioners have not waived their Sixth Amendment rights, knowingly and intelligently, by "clear, unequivocal

and unambiguous language" [*United States v. Garcia*, 517 F. 2d 272, 278 (5th Cir. 1975)], is implicitly and effectively to rewrite the Constitution and establish a *per se* rule which, despite Petitioners' expressed preference to retain counsel of their choice and an expressed willingness to relinquish their right to conflict-free representation, disqualifies counsel under all circumstances from representing more than one defendant in a criminal case.

To protect Petitioners' Sixth Amendment right to retain counsel of their choice and to guarantee the orderly administration of justice this Court must fashion uniform criteria for the determination of a "knowing and intelligent" waiver in the context of relinquishing conflict-free representation prior to trial. An instructive model has been provided by the Fifth Circuit in the case of *Zuck v. Alabama*, 588 F. 2d 436, *cert. denied*, 100 S. Ct. 63 (1979). In that case the court set forth criteria to be used, analogous to Rule 11 requirements imposed on trial courts before accepting a guilty plea, in determining whether a defendant has made a valid waiver. According to *Zuck*, the Government is required to show only that the defendant (1) is aware of the conflict, (2) realizes the consequences that may result from such a conflict, and (3) is aware of his right to separate representation. *Id.* at 440.

The first and third *Zuck* criteria are easily satisfied. The second criterion—that a defendant realize the consequences which may result from a conflict—poses a more subtle situation. Nevertheless, at least one thoughtful commentator has suggested that satisfaction of this criterion may be obtained by an *in camera* conference during which

> ". . . the judge would ask the defendants or counsel to explain, first, why the defendants and counsel wanted joint representation; second, whether a conflict existed or was anticipated; third, how counsel intended to prevent any conflict; fourth, what the de-

> fense would be and the evidence to establish it; fifth, the substance of every conversation between counsel and the defendants regarding these matters; and sixth, any other matters the court thought might help the defendants make an informed decision. Defendants would be expected to waive the attorney-client privilege and personally disclose or permit counsel to disclose that information. Defendants would be expected to affirm or to comment upon counsel's statements. If defendants refuse to provide this information personally or through counsel, they would be denied joint representation. If they give this information, their waiver of the right to conflict-free representation will be as informed, intelligent, and binding as possible." Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L. J. 1075, 1118-1120 (1979).

The approach suggested in the above quotation was implicitly adopted by the Third Circuit in *United States v. Laura*, 607 F. 2d 52 (1979) but unfortunately, and to the prejudice of Petitioners, the lesson of *Laura* was ignored by the trial court.

II.

CONCLUSION.

The importance and substantiality of the questions presented have not been denied. The United States wholly misapprehends the requirements of the Sixth Amendment to the Constitution in this case. In light of the inability of the Government in its Brief to analyze critically the issues presented in the Petition the need for plenary review of the action below is indisputable; indeed, Petitioners suggest that summary reversal is now in order.

Respectfully submitted,

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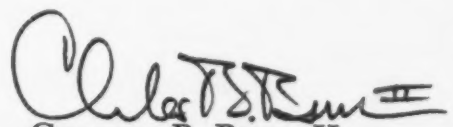
CERTIFICATE OF SERVICE.

I hereby certify that on the 6th day of May, 1980, pursuant to Rule 33(2)(a), three (3) copies of the within Petitioners' Reply to Brief For the United States In Opposition were deposited in a United States mail box with first class postage prepaid addressed to the only party herein to be served: Solicitor General, Department of Justice, Washington, D. C. 20530.



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